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# *In The*
# *Supreme Court Of The United States*

October Term, 1998

STATE OF WASHINGTON,

*Petitioner,*

v.

UNITED STATES OF AMERICA, et al.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## STATE'S REPLY TO BRIEFS IN OPPOSITION

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## A. Certiorari Is Necessary To Resolve Conflicting Methods Of Treaty Interpretation

The State of Washington's first question asks the Court to resolve a conflict between two different methods for analyzing the nature of off-reservation treaty rights to take natural resources. The paradigm advanced by the tribes (Respondents) and the United States (Respondents), and adopted by the Ninth Circuit, holds that a treaty securing a right of taking fish at all usual and accustomed grounds and stations reserves any fishery the tribes theoretically could have exploited at treaty time, regardless of whether they actually did so. This method of treaty interpretation conflicts with the paradigm followed by this Court and other courts that treaty rights are defined by proof of actual treaty time Indian activities. The Court should accept certiorari to resolve this conflict regarding the basic nature of off-reservation treaty rights.

**1.** Under the ruling of the Ninth Circuit:

> "'The fact that some species were not taken before treaty time—either because they were inaccessible or the Indians chose not to take them—does not mean that their **right** to take such fish was limited.'" *United States v. Washington* (*Shellfish* III), 157 F.3d 630, 644 (9th Cir. 1998) (quoting *Shellfish* I, 873 F. Supp. at 1430) (emphasis added); App. at 19.

According to the Ninth Circuit, these treaties secured rights to fisheries the tribes did not use or even imagine at treaty time.

**2.** The Ninth Circuit's decision conflicts with decisions holding that treaties secure the continuation of specific treaty time activities and that no treaty right exists when a tribe fails to prove that it is the continuation of a treaty time activity. *See United States v. Dion*, 752 F.2d 1261 (8th Cir. 1985) (*en banc*), *reversed in part*, 476 U.S. 734 (1986); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians*

*v. Wisconsin*, 758 F. Supp. 1262, 1269 (W.D. Wis. 1991).[1] In *Dion*, the court ruled that a treaty right to hunt did not include the right to hunt eagles for commercial purposes, because the Indians did not hunt eagles for commercial purposes at treaty time. The Ninth Circuit applied this same analysis. *United States v. Top Sky*, 547 F.2d 486, 487-88 (9th Cir. 1976). Similarly, in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, the court ruled that an off-reservation right to gather from the forest did not secure a right to harvest timber, because there was no evidence of treaty time timber harvesting.

Respondents attempt to distinguish *Dion* by arguing that the Indians in that case did not intend or understand the treaties to reserve the right of hunting eagles for commercial purposes. Tribes' Br. at 13; U.S. Br. at 13 n.7. This response illustrates the two conflicting paradigms in this case. How did the court in *Dion* know what the Indians intended and understood about limits to their hunting rights? The court looked at evidence of treaty time activity. The Ninth Circuit's approach is entirely different. Under the Ninth Circuit's ruling, whether a tribe historically exercises a particular right is irrelevant, because treaty time Indians had a hypothetical right to sell eagles, or to harvest timber, even though they did not choose to, or could not.

**3.** Respondents also cannot distinguish prior decisions interpreting the treaties at issue in this case. Until the decisions below, these treaties had been interpreted as securing the continued use of specific fisheries and specific places.[2] In

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[1] Although *Lac Courte Oreilles* is a district court ruling, it arises in the extensive Seventh Circuit supervision of off-reservation treaty rights of the *Lac Courte Oreilles* Indians.

[2] Similar rulings date back 100 years. *See Seufert v. Olney*, 193 F. 200 (E.D. Wash. 1911) (no evidence that site was traditionally used);

the original case defining the nature of the treaty right to salmon, the district court required each tribe to come forward with evidence of where they took salmon runs at treaty time. *United States v. Washington* (*Washington* I), 384 F. Supp. 312, 359-82 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). The district court established this as the method to define the scope of any treaty right to non-anadromous fish or shellfish, requiring "prima facie evidence" of the "**species taken at treaty times, where (usual and accustomed grounds), and by what tribes (who are entitled to exercise treaty entitlement)**[.]" *United States v. Washington* (*Washington* II), 459 F. Supp. 1020, 1038 (W.D. Wash. 1978).[3] The court later ruled there was no treaty right to certain herring fisheries when some tribes failed to prove they harvested from that fishery at treaty time.[4]

Similarly, this Court applied the method of analyzing actual treaty time fisheries in *Washington v. Washington State Commercial Passenger Fishing Vessel Association (Fishing Vessel)*, 443 U.S. 658, 678 (1979). The court affirmed equitable allocation to harvest half the salmon runs only after reviewing evidence of Indians exercising broad rights to take salmon at treaty time. This analysis of historic use would have been unnecessary under the Ninth Circuit's holding because

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*United States v. Taylor*, 3 Wash. Terr. 88, 13 P. 333 (1887), *enforced in* 44 F. 2 (C.C.D. Wash. 1890).

[3] Although the district court spoke in terms of species and places, the more common term is "fishery". "Fishery" is the word used to describe fishing activity in terms of "stocks", "species", and "habitats". *E.g.*, 16 U.S.C. § 1802(13) (Magnuson Act); Wash. Rev. Code 75.08.011(21).

[4] The district court found that although the Suquamish Tribe and the Swinomish Tribe once fished herring, they had not shown usual and accustomed places. App. at 165-66. The Squaxin Island Tribe and the Upper Skagit Tribe had not shown any treaty time herring fishing at any place. App. at 166.

salmon are fish, and Indian tribes had a theoretical right to make broad use of salmon runs at treaty time.

**4.** The Ninth Circuit's new rule presents significant problems beyond the fishing right at issue in this case. Nationally, there are off-reservation usufructuary rights that include fishing, hunting, taking of marine mammals, grazing, gathering of wild foods, and taking of forest products. When an off-reservation treaty right is not defined by treaty time Indian activities, both state powers and private interests may be displaced by unpredictable, springing tribal claims.

**5.** Respondents strive to convey the impression that certiorari is not appropriate because this is a "fact bound" case. In reality, this case presents the question of the proper method of interpreting the nature of off-reservation treaty rights to use natural resources. Both the district court and the Ninth Circuit rejected any factual analysis of historic deep water shellfish use, holding it was unnecessary under their view of the nature of treaty rights. Other cases have required proof of treaty time activity. This Court may squarely address whether the Ninth Circuit's ruling and its paradigm for off-reservation treaty rights is correct. No factual dispute prevents the Court from reaching this important question.

Furthermore, the record does not contain disputed facts. The parties simply draw different conclusions from the historic record. To the extent there is a dispute over deep water shellfish use in the record, it would be a matter for remand after resolving whether historic Indian use defines what fisheries are secured, and whether historic dependence affects the equitable allocation of those fisheries.[5]

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[5] Respondents claim that the State is ignoring evidence that treaty time Indians harvested the deep water shellfish species. However, the tribes' own archaeologist testified that the shellfish he found in some 1,000 archaeological sites were overwhelmingly comprised of clams, oysters,

**6.** Respondents argue that defining treaty rights in terms of historic Indian activities would impose a "technology limit". This argument is inaccurate. The State does not seek to limit how a modern tribal member continues participation in what the tribes recognize as "ancient fisheries". The State's point is that historic technology helps define what was an "ancient fishery".

Labeling historic Indian use of natural resources as a "species limit" or "technology limit" simply obscures the fundamental conflict over the nature of off-reservation rights. Under one set of cases, treaty rights to take off-reservation resources were specifically intended to secure the continuation of well-known activities of treaty time Indians. Under these cases, the court of equity protects the understanding of treaty time Indians without unnecessarily preempting the general laws of the states or the United States. The Ninth Circuit's ruling below presents a significant conflict with these prior cases, by holding that rulings about salmon fishing rights have created

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mussels, and other shellfish commonly gathered from intertidal areas, with almost no evidence of deep water shellfish. SSER 28-31. To answer a question by the Judge, he explained that "deep water" shellfish were rare:

> "[D]eep water [shellfish were obtained by the Indians] when they are washed in, **but that's a real small percentage** of the animals we're seeing in these [1,041 archaeological] sites." SSER 31 (emphasis added).

The State's petition acknowledged that one unique tribe, the Makah, showed evidence of harvests for sea urchins, although the trial court did not determine if the Makah showed any "usual and accustomed" places for taking urchins. State's Pet. at 5 n.3.

Respondents also argue that a court would be overcome by the difficulty of defining treaty rights in terms of treaty time fisheries. The simple response is that modern fishery management agencies control fisheries using user groups, locations, and specified fish and shellfish stocks, and a court defining historic fishing is equally capable of setting such boundaries and limits.

generic fishing grounds where tribes control half of all present and future fisheries.

### B. Certiorari Should Decide If Equitable Allocation Of A Fishery Must Be Based On Historic Dependence On That Fishery

The State's first question also presents a fundamental conflict over the proper method to equitably allocate a fishery between treaty and non-treaty fishers. Respondents' claim that half of all fisheries must be allocated as a treaty share conflicts with this Court's decision in *Fishing Vessel*, which based the 50 percent allocation of salmon on the tribes' historic dependence on salmon.

**1.** The Ninth Circuit allocated half of the deep water shellfish, such as crab and shrimp, to the tribes even though they did not depend on these fisheries at treaty time. Respondents contend that this follows from the "first step" in equitable allocation, which they say divides all harvests into equal treaty and non-treaty shares. Tribes' Br. at 15-16; U.S. Br. at 18. In essence, they analyze the question of equitable allocation as if the State and the tribes are co-tenants over off-reservation fishing grounds, which ensures that tribes receive half of all fisheries.[6]

**2.** *Fishing Vessel* did not use a co-tenancy theory to allocate a tribal share of salmon runs. Instead, this

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[6] In passing, the tribes contend that arguments about equitable allocation are not preserved. The State pleaded there should be no rights to fisheries not taken historically (ER 13-23), putting the issue in the pre-trial order. ER 80-81. The State has repeatedly cited *Fishing Vessel* to preserve all equitable allocation arguments.

Significantly, the tribes make no argument that this Court cannot, on this record, decide whether the lower court should have examined historic tribal use and dependence on a fishery before granting half of that fishery to treaty Indians, or any other indicator that the State's allocation argument was not encompassed by arguments at trial and on appeal.

Court applied equity. The first step for equitable division is to determine if there is heavy historic Indian dependence to protect:

> "[The trial court] first concluded that at the time the treaties were signed, the Indians, who comprised three-fourths of the territorial population, **depended heavily on anadromous fish [salmon] as a source of food, commerce, and cultural cohesion**. . . . **Only then** did it determine that the Indians' present-day subsistence and commercial needs should be met, subject, of course, to the 50% ceiling." *Fishing Vessel*, 443 U.S. at 686 (emphasis added).

The State agrees that treaty time tribes were dependent on their salmon runs. Similarly, treaty time Indians depended on intertidal shellfish gathering in many places. Respondents, however, cannot deny that the exhaustive treaty time dependence on salmon runs is starkly different from the minimal use of shrimp, geoduck diving, off-shore crab, and other fisheries that had no treaty time antecedent.

**3.** This case clearly and directly presents the issue of what is the proper method of equitable allocation. Under the Ninth Circuit's view, a treaty right to fish, hunt, or gather automatically entitles the Indians to half of the natural resource. Under the analysis in *Fishing Vessel*, the Court exercises its equitable power to allocate to maintain the Indians' access to a fishery they historically depended upon.

**4.** The repercussions of the Ninth Circuit's ruling on equitable allocation of new fisheries are dramatic. Amicus State of Oregon shows how it invested millions of dollars to develop fisheries and processing techniques to take otherwise inedible whiting and make it a valuable natural resource. Amicus crab fishing associations confirm that their seasons have been cut in half or more in places. The Court should

resolve this question because it has a profound impact on all present and future fisheries.

### C. The Ninth Circuit's Failure To Consider The Equal Footing Doctrine Denies Washington State Its Power To Control Use Of Its Tidelands

The State's second question asks whether tribal members may enter and take shellfish from tidelands that are cultivated or otherwise privately controlled. Respondents do not deny that the tribes ceded all right, title, and interest to lands outside reservations. The Ninth Circuit, however, interpreted the treaty to deny the State its power to permit cultivation or private harvest of shellfish, except in places where there is no so-called "natural bed" of shellfish. This imposes a permanent, vague servitude that affects thousands of properties and contradicts one hundred years of practical treaty construction.

**1.** The Ninth Circuit rejected any duty to interpret these treaties in light of the Equal Footing Doctrine and federalism purposes of the United States. Instead, the Ninth Circuit ruled that the Equal Footing Doctrine applies only to fee simple ownership claims to aquatic lands. In addition, the Ninth Circuit held the doctrine inapplicable to defining rights that Indians reserve in a treaty. The tribes and the United States do not deny that these rulings conflict with numerous decisions of this Court. U.S. Br. at 20; Tribes' Br. at 20.

**2.** Instead, the tribes and the United States argue that the short discussion of the Equal Footing Doctrine in *United States v. Winans*, 198 U.S. 371 (1905), as discussed in *Fishing Vessel,* controls. Neither *Winans* nor *Fishing Vessel* interprets whether the Shellfish Proviso preserved the future state's power to allow shellfish beds to be staked or cultivated to the exclusion of public or Indian shellfish gathering. Under the Equal Footing Doctrine, a court presumes that the United

States does not encumber future state control over and title to tidelands. That presumption is not overcome "unless the intention was definitely declared or otherwise made plain". *Montana v. United States*, 450 U.S. 544, 552 (1981). The Shellfish Proviso does not definitely state Congress' intent to diminish equal footing status. It states the opposite.

The conflict arising from the Ninth Circuit's failure to consider the proviso in its constitutional context presents an important question for certiorari, because it concerns fundamental state powers and affects thousands of properties sold or leased by the State. Respondents argue that the doctrine has no relevance to interpretation of the Shellfish Proviso, because the trial court interpreted the proviso to permanently preclude staking or cultivation on the tribes' traditional natural beds. Tribes' Br. at 21 n.24; U.S. Br. at 20 n.13. Citing the ultimate interpretation of the proviso as a reason to avoid examining the Equal Footing Doctrine is circular logic. The Ninth Circuit should have interpreted the Shellfish Proviso in light of the Equal Footing Doctrine to determine whether state power to lease and convey all natural shellfish beds is preserved.[7]

**3.** The best illustration of how the Ninth Circuit's opinion cannot be supported by *Winans* is to compare the contrasting arguments of the Solicitor General in the two cases. In 1905, the Solicitor General agreed with the State's current argument that treaties secure only specific fisheries and access rights to well known fishing places. Few lands would be subject to a servitude created by the treaty. The Solicitor General explained: "We are not seeking to impress a broad and

[7] At best, the argument that shellfish rights are permanent responds to the tension with the Tenth Circuit's holding that "temporary" Indian hunting rights do not survive statehood because of the Equal Footing Doctrine. *See Crow Tribe v. Repsis*, 73 F.3d 982 (10th Cir. 1995), *cert. denied*, 517 U.S. 1221 (1996).

vague servitude on all patented lands along the Columbia, but only a clear and limited one on this particular small tract." *Winans*, 198 U.S. at 373 (argument of Solicitor General). Off-reservation rights were "like a ripened prescription" for those particular famous fisheries and places. *Id.* at 374.

Today, the United States argues that *Winans* and *Seufert Brothers Co. v. United States*, 249 U.S. 194 (1919), "stand for the settled proposition that Indians have a right of access over private property to effectuate their treaty fishing rights". U.S. Br. at 24. This is the very same "broad and vague servitude" that the United States specifically disclaimed in *Winans*. This broad and vague easement is inconsistent with the equal footing presumptions that the federal government intended to preserve the future states' power over its aquatic lands. The Court should grant certiorari to decide when treaty rights were intended to preempt a state's sovereign power to determine future ownership and use of aquatic lands.

Respectfully submitted,

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